

1 THE WITNESS: You know, if we had
2 NHL, NFL, that would make it. If we had
3 baseball, that would make it. NASCAR could
4 help make the network, you know, a big sport
5 that has a big draw across all the country.
6 That --

7 JUDGE SIPPEL: And then would you
8 like things like -- what is it? -- hook and
9 bait or hook and chute or something like that?
10 I mean, that's --

11 THE WITNESS: We would --

12 JUDGE SIPPEL: Cage fighting?

13 THE WITNESS: A lot of people like
14 that, but --

15 JUDGE SIPPEL: That's why I'm
16 asking you.

17 THE WITNESS: Well, would we let
18 go of it? I mean, it --

19 JUDGE SIPPEL: Why bother with it
20 if you've got -- if your focus is on all these
21 ---

22 THE WITNESS: It becomes more of a

1 filling for the big -- if it drives -- the
2 profitability would be in bigger sports, but
3 you have to have some of the other sports as
4 well.

5 I feel like I'm not doing a good
6 job explaining to you.

7 JUDGE SIPPEL: You're doing a fine
8 job explaining to me, but, I mean, you're the
9 -- you know, when you get introduced as a
10 witness and you're finance, I'm thinking,
11 well, this is a guy that's going to go
12 numbers. This is a number-crunching guy.

13 And now you've got yourself and
14 I've got you, really, into a much bigger
15 picture guy than just finance.

16 THE WITNESS: And I was the chief
17 financial officer. I can't remember how I got
18 dragged into this conversation that we're into
19 right now, but the point being I was mainly
20 the finance person.

21 And I think what we started to say
22 from the U.S. Open point of view, there was a

1 debate internally. I didn't like the U.S.
2 Open because it literally lost [REDACTED] million a
3 year for me on Versus.

4 JUDGE SIPPEL: That was the tennis
5 open, right?

6 THE WITNESS: The U.S. Open, the
7 U.S. Tennis Open. On Versus that we were
8 bidding for, it literally lost [REDACTED] million a
9 year for it. So I was just suggesting that,
10 although this is -- Kim Armor and I were
11 putting a pitch together as to why we should
12 do it, there were other arguments against it
13 as well. And it wasn't that everybody
14 subscribed to all the points she was making.

15 This was kind of a little bit of a
16 bitch to some of us in Comcast as to why we
17 should go after the U.S. Open.

18 JUDGE SIPPEL: Well, but is there
19 one side of that decision-making group with
20 Comcast that doesn't particularly like tennis?
21 I mean, you don't want to play tennis? And
22 there are other groups in there, like the

1 woman who you are talking about here. She's
2 really big on tennis?

3 THE WITNESS: I don't think
4 anybody was -- I don't think anybody disliked
5 it or was really big on it. It was just some
6 content that we could put on Versus that would
7 fit with the network.

8 JUDGE SIPPEL: And it was.

9 THE WITNESS: But I don't think
10 anybody was really strongly passionate about
11 it one way or the other.

12 JUDGE SIPPEL: Well, the thing
13 that gets me off on this line so much is that
14 it was like your testimony is about the
15 prospects for the out-years and how do you
16 have a crystal ball and know whether or not
17 professional tennis is or is not going to be
18 worthwhile down the road.

19 And you know what it is now. So
20 maybe there is an element of a gamble on it.
21 But how do you know for the future. I mean,
22 I'll just ask my question.

1 THE WITNESS: To me, Your Honor,
2 it was a statement in here about providing a
3 hedge against distribution or --

4 JUDGE SIPPEL: Yes. Go ahead.

5 THE WITNESS: And it is my belief
6 that tennis would not have provided Versus a
7 hedge against distribution, that whether or
8 not we had the programming that the U.S. Open
9 on the network I don't think would have gotten
10 us any additional subscribers for Versus. I
11 don't think it would have gotten us a penny
12 more in affiliate rates. That was my belief.
13 And so I didn't really view this content, this
14 sport as providing hedge against distribution.

15 That's kind of how we got down
16 this twisted path. I apologize, but that was
17 the part I was taking exception to.

18 JUDGE SIPPEL: Well, you're doing
19 fine. You're explaining to me what I want to
20 hear. Where I go with that explanation I am
21 not sure. It provides a distribution hedge.
22 Have you ever seen that concept presented to

1 you before in the context of analyzing these
2 deals?

3 THE WITNESS: I'm sorry. The
4 concept of distribution hedge?

5 JUDGE SIPPEL: Yes. I mean, --

6 THE WITNESS: No.

7 JUDGE SIPPEL: -- it's a novel
8 feature in a presentation like this.

9 THE WITNESS: Well, I think if you
10 have strong content, like the NHL, and you
11 have the NHL playoffs, it's a distribution
12 hedge. Distributors want to carry that. So
13 that's a --

14 JUDGE SIPPEL: No question about
15 it.

16 THE WITNESS: Right. And so
17 that's what we're saying. And I'm just saying
18 I disagreed with Kim that the U.S. Open
19 tournament in and of itself was a distribution
20 hedge.

21 JUDGE SIPPEL: Well, it just
22 sounds to me like as a -- and, again, I guess

1 this is a marketing thing. I'm trying to put
2 myself in that context.

3 You really had to kind of get
4 excited about a marketing concept going into
5 the future. We have to be just all of the
6 things that you would know about it. You
7 know, the money you want to make available,
8 the money you want to put into it in the end
9 you want to put into it.

10 And it just sounds to me like this
11 -- what's this woman's name again? I'm sorry.

12 THE WITNESS: Kim Armor?

13 JUDGE SIPPEL: Kim. Kim Armor
14 comes up with this. And she's getting hit
15 with a lot of opposition, at least getting
16 your opposition, because you don't think that
17 that sport is going to be a hedge?

18 THE WITNESS: That was my belief.

19 JUDGE SIPPEL: But if you're
20 saying that it would be something like the
21 National Hockey League, how can you have a
22 hedge that is not the National Hockey League

1 or National Football League or National
2 Basketball Association? How can you have one?

3 I mean, I'm sorry. I'm sorry.
4 I'm trying to -- I'm sorry. I'm getting a
5 little bit tense about it because I want to be
6 sure I understand you, not that I'm trying to
7 argue with you. But do you see where I am
8 coming from?

9 THE WITNESS: Right. I guess what
10 was -- the point that I was trying to get
11 across is it sounds like we were trying to
12 keep Versus off of tennis so we could get it
13 on Versus, that U.S. Open --

14 JUDGE SIPPEL: Say it again.

15 THE WITNESS: It sounds like he
16 was trying to lead you to believe that we were
17 trying to keep the U.S. Open off of Tennis so
18 we could put it on Versus. And my only point
19 is it really didn't do that much for us on
20 Versus.

21 And, in fact, it lost me [REDACTED]
22 million a year that wasn't something that I

1 would view as, arguably, beneficial. And it
2 was being suggested that getting U.S. Open on
3 Versus would be good for Versus. I'm just
4 saying it wasn't that black and white.

5 We didn't -- I would have been
6 perfectly fine without U.S. Open on Versus is
7 my point.

8 JUDGE SIPPEL: Well, again, I'm
9 not trying to argue with you. I'm just
10 getting you one perspective on it. And that
11 is that if a program comes to some -- a cable
12 company and says, "Look, we cannot only bring
13 you tennis matches. We can bring you the U.S.
14 Open if we can work this deal out." I mean,
15 I'm either going to -- I'm either not going to
16 hear a word about tennis in my organization or
17 that is going to sound pretty impressive.

18 THE WITNESS: Well, it depends on
19 the --

20 JUDGE SIPPEL: I don't know
21 whether you want to call it a hedge or not.

22 THE WITNESS: It depends on the

1 cost.

2 JUDGE SIPPEL: Everything comes
3 down to that.

4 THE WITNESS: And this was costly
5 programming that would have, you know,
6 generated losses.

7 JUDGE SIPPEL: Okay. In the short
8 run. But you think that it was --

9 THE WITNESS: I don't --

10 JUDGE SIPPEL: You don't think
11 that it was a good investment for the future?

12 THE WITNESS: I don't.

13 JUDGE SIPPEL: All right. I'm
14 sorry. I'm not trying to get my side of this
15 --

16 THE WITNESS: I don't know whose
17 side is what.

18 JUDGE SIPPEL: I'm not sure what
19 it is either. That's why I'm trying to just
20 understand the dynamics that go on.

21 THE WITNESS: Right.

22 JUDGE SIPPEL: I'm finished. I'm

1 finished.

2 BY MR. SCHMIDT:

3 Q You know, sir, that not everyone
4 agreed with your view that this wasn't worth
5 the money, right, that U.S. Open was not worth
6 the money?

7 A Well, it depends on what value you
8 placed on it, right?

9 Q Well, for example, you don't deny
10 that exhibit 41 contains the views of Ms.
11 Armor, the CFO of Versus, correct?

12 A This is her deck, but I don't now
13 how much money she was willing to pay to get
14 it.

15 Q And before I leave this document
16 and turn to my next question, do you mind
17 looking at page 11?

18 A Uh-huh.

19 Q Do you see where it describes on
20 page 11 the competitive landscape for U.S.
21 Open rights?

22 A Yes, I do.

1 Q And it surveys the potential
2 competitors for U.S. Open rights, ESPN, TNT,
3 USA, and the Tennis Channel, on page 11 here?

4 A Yes, it does.

5 Q And you see for Tennis Channel,
6 the pros Tennis Channel has is its natural fit
7 for the U.S. Open. That makes sense, right?

8 A Right.

9 Q And the cards that it has are
10 distribution issues. Do you see that?

11 A Yes, I do.

12 Q And distribution issues are some
13 of the points you were talking about in your
14 earlier correspondence about Tennis Channel's
15 limited distribution, right?

16 A Distribution issues? Yeah. This
17 is talking about that type of distribution.

18 Q Now, I'd like to round this out
19 because one of the people who I think
20 ultimately disagreed with your assessment of
21 Tennis Channel is Mr. Shell. I'm sorry. Let
22 me re-ask my question. I asked it wrong.

1 One of the people who ultimately
2 disagreed with your assessment of the value of
3 the U.S. Open was Mr. Shell because he, in
4 fact, bid on U.S. Open rights, didn't he?

5 A I don't know. Honestly, I don't
6 remember if he did or did not.

7 Q Let me show you another document.

8 MR. SCHMIDT: May I approach, Your
9 Honor?

10 JUDGE SIPPEL: Please do. By the
11 way, I want to be sure everybody gets the
12 intensity of my questions has nothing to do
13 with my questioning this witness' integrity or
14 his truth telling. If it's anybody's fault,
15 I guess it's my fault, but I'm not in that
16 game.

17 BY MR. SCHMIDT:

18 Q This is Tennis Channel exhibit 43.
19 It looks like another one of these slide decks
20 from several weeks later, July 25, 2007.

21 A Okay.

22 Q Do you recall saying at your

1 deposition that you had seen this?

2 A I don't, but if that's what I said

3 --

4 Q Have you seen this?

5 A I'm just looking at it.

6 Q Please? Absolutely take your
7 time. I don't mean to rush you.

8 A (Perusing document.) Okay.

9 Q So this is a later version, it
10 looks like, of the slide deck that you were
11 previously looking at that we marked as Tennis
12 Channel exhibit 41, correct?

13 A Yep.

14 Q You would expect that this was
15 also prepared by Ms. Armor?

16 A I would.

17 Q For her discussions with you and
18 Mr. Shell?

19 A That would be my guess.

20 Q Let's look at the second page of
21 the document. And the second page of the
22 document reflects that by this point in time,

1 Versus has now met with the USTA regarding the
2 U.S. Open. Do you see that at the top?

3 A I do, uh-huh.

4 Q And then presented to the USTA
5 Comcast-Versus strengths and Comcast-Versus
6 concerns. Do you see that?

7 A Yes, I do.

8 Q And one of the strengths is
9 marketing ability, power of Comcast. Do you
10 know what the power of Comcast is?

11 A I do not.

12 Q And one of the concerns is the NFL
13 perception is took step backwards with Versus.
14 Do you know what that reference is? I'm
15 sorry. I said NFL. I meant NHL.

16 A NHL.

17 Q Yes.

18 A Initially when the NHL moved from
19 ESPN to Versus, it was, you know, potentially
20 perceived as a step backwards initially.

21 Q For the NHL?

22 A Yeah, that's what this would say.

1 Q Okay. Based on its perception of
2 the standing of Versus as a channel?

3 A Vis-a-vis ESPN.

4 Q Okay.

5 A And at that time Versus was
6 Outdoor Life Network.

7 Q Okay. Let's flip ahead to -- by
8 this point in time, we know that Mr. Shell or
9 somebody associated with Versus has actually
10 met with the USTA regarding the U.S. Open,
11 correct?

12 A That's what it appears. I don't
13 know who met, actually. You can't really
14 tell, can you?

15 Q Let's flip ahead to page 17.

16 A Okay.

17 Q Page 17 has a bar graph on it.
18 And I hope we can both read this. The copy
19 quality is not great. But if you look at it,
20 the title of the slide is the "Go for it
21 Programming Strategy." Do you see that?

22 A Yes, I do.

1 Q This was a strategy for Versus
2 going forward into the future, correct?

3 A This is one of the strategies.

4 JUDGE SIPPEL: Sorry. What page
5 are you on?

6 MR. SCHMIDT: I am on page 17,
7 Your Honor.

8 JUDGE SIPPEL: I am, too. And
9 this is on an exhibit? Forty-one?

10 MR. SCHMIDT: No. This is now 43.

11 JUDGE SIPPEL: Forty-three.

12 MR. SCHMIDT: Yes.

13 JUDGE SIPPEL: You handed me --
14 here it is over here. I'm sorry. Go ahead.

15 MR. SCHMIDT: It's page 17, the
16 "Go for it Programming Strategy."

17 BY MR. SCHMIDT:

18 Q And that was the most aggressive
19 growth strategy for Versus in this document,
20 right? That's what "Go for it" means?

21 A I think so. Let me just check.
22 (Perusing document.) Yep.

1 Q And "Go for it" meaning try to
2 build it into something like ESPN, correct?

3 A I didn't think we ever thought we
4 would be fully competitive with ESPN.

5 Q Along those lines?

6 A Bigger than it was today.

7 Q Okay. And the first item under
8 the "Go for it Strategy" is "Acquire U.S. Open
9 and U.S. Open series cable rights." Do you
10 see that?

11 A Let's see. That was one of the
12 ways that we were thinking about it. There
13 were other ways.

14 Q That's the first listed way,
15 right?

16 A It was a U.S. Open deck.

17 Q Okay. And just before I leave
18 this document, do you see that it has
19 statistics on the different types of
20 programming available on Versus?

21 A I'm sorry? Where is that?

22 Q That's as I understand it --

1 A The bar graphs itself?

2 Q Yes.

3 A Okay.

4 Q And the biggest category is field
5 sports. Do you see that?

6 A Yes, I do.

7 Q The second biggest category with
8 1,460 hours in 2008 is infomercials?

9 A Yes, I do.

10 Q And then the NHL, at least to the
11 one that's listed here, is either the second
12 or -- the smallest or the second smallest,
13 correct?

14 A It's a lot of hours in one sport.
15 Yes, I do.

16 Q Do you know what U.S. Open series
17 cable rights are?

18 A The rights to the tennis
19 tournaments, to the U.S. Open.

20 Q Okay. Do you know who presently
21 holds those rights?

22 A I do not.

1 Q You don't know that it's the
2 Tennis Channel?

3 A Okay. I may have known that. I
4 don't remember that. I apologize.

5 Q Did you know that at the time you
6 were competing with the Tennis Channel for
7 those rights?

8 A I think we actually thought we
9 were competing more with some of the larger
10 players in it. I think what we really wanted
11 was the final tournament, not the games
12 leading up to the final tournament.

13 Q Okay. Let me show you one more
14 document, maybe the last one, maybe one more
15 after this. This one is much longer than it
16 needs to be. It's already in evidence.

17 MR. SCHMIDT: May I approach, Your
18 Honor?

19 JUDGE SIPPEL: Please?

20 MR. SCHMIDT: This is Tennis
21 Channel exhibit 143. Actually, this one I
22 don't think you can because we're using the

1 testimony for different purposes. It's the --

2 JUDGE SIPPEL: Proceed. Proceed.

3 MR. SCHMIDT: -- designation
4 process the parties have gone through. This
5 is Mr. Shell's deposition.

6 THE WITNESS: Okay.

7 MR. SCHMIDT: The reason there are
8 so many questions is because my partner Mr.
9 Phillips took the deposition. I'm going to
10 focus you on some unusually focused questions
11 here.

12 MR. CARROLL: Your Honor?

13 JUDGE SIPPEL: Yes, sir?

14 MR. CARROLL: The only question I
15 have is I'm not sure what the predicate
16 reading to one witness the testimony of a
17 different witness, which I think is what we
18 are about to do.

19 JUDGE SIPPEL: That's a good
20 question.

21 MR. CARROLL: I don't know what
22 this --

1 JUDGE SIPPEL: Lay a little
2 foundation for us.

3 MR. SCHMIDT: Okay. Really, what
4 I intend to do, Your Honor, is on pages 40 and
5 41, Mr. Shell describes the Versus bid for the
6 U.S. Open. And I just want to read it to Mr.
7 Donnelly and see if it refreshes his
8 recollection.

9 JUDGE SIPPEL: On what?

10 MR. SCHMIDT: On the fact that
11 Versus bid and the amount of the bid, which I
12 think may be, may not be contradictory to what
13 he said about the losses.

14 BY MR. SCHMIDT:

15 Q So, if I may, Mr. Donnelly, what I
16 would do is direct your attention to page 40.

17 JUDGE SIPPEL: Well, wait a
18 minute. I want to see what Mr. Carroll has to
19 say about that.

20 MR. CARROLL: I don't think that
21 is proper addressing. I mean, it's not
22 impeachment. If it were the witness' own

1 testimony, that would be one thing. If it
2 were the witness' own document, that would be
3 one thing. But reading someone else's
4 testimony, this would be the same as if we
5 wanted to read trial testimony of one witness
6 to another.

7 This testimony to be read is from
8 a deposition. It's coming into the record for
9 what it's coming in. I really don't think
10 there's a predicate for doing it with this
11 witness.

12 And I think this hour on our last
13 day, it's just reading into the record for
14 that sake. And there will be time enough to
15 do that, but I don't think you do it through
16 this witness.

17 MR. SCHMIDT: That is not the
18 purpose, Your Honor. And that is an ironic
19 objection given that they showed him notes
20 that he didn't --

21 JUDGE SIPPEL: Who is the "they,"
22 and who is the "him"?

1 MR. SCHMIDT: Mr. Moss showed the
2 witness notes. Your Honor will remember that
3 he was shown notes that he didn't write to
4 refresh his recollection.

5 JUDGE SIPPEL: I do recall. Okay.
6 I recall the --

7 MR. SCHMIDT: I think this is the
8 same thing. And I, frankly --

9 MR. CARROLL: Your Honor, I would
10 be --

11 MR. SCHMIDT: May I finish, Mr.
12 Carroll?

13 MR. CARROLL: Sure.

14 JUDGE SIPPEL: Let him finish.

15 MR. SCHMIDT: I would, frankly, be
16 done with my question on this now if I were
17 allowed to ask it, but to me it's exactly the
18 same thing. If Mr. Moss can show him notes
19 that someone at the Tennis Channel wrote about
20 the discussion to see if they refresh his
21 recollection, I don't know why I wouldn't be
22 able to show him sworn testimony, under oath

1 subject to cross-examination, of his boss to
2 see if they refresh his recollection. If they
3 don't, then my question is done.

4 JUDGE SIPPEL: Well, as a
5 hypothetical, supposing Mr. Shell were being
6 called as a witness in this case and he was
7 going to testify just before Mr. Donnelly.
8 Would Mr. Donnelly be permitted under your
9 agreements for excluding witnesses? Would he
10 be permitted to sit in the courtroom and
11 listen to his testimony?

12 MR. SCHMIDT: I don't think we
13 actually reached any such agreement, but --

14 MR. CARROLL: Yes, we did. No
15 fact witness is permitted to witness any other
16 fact witness' testimony. They have all been
17 excluded.

18 MR. SCHMIDT: I don't dispute that
19 that would be the rule.

20 MR. CARROLL: That's not what --

21 MR. SCHMIDT: May I finish? I
22 don't dispute that that would be the rule. I

1 agree with that. I think a deposition
2 transcript, though, is different. And I'm
3 doing it for a limited purpose.

4 The concern with having a witness
5 in the room is that it will somehow shape
6 their testimony. He's given his testimony on
7 this. He doesn't remember. So all I'm trying
8 to do is refresh his recollection.

9 JUDGE SIPPEL: That might have a
10 shaping element to it. I can't avoid that
11 conclusion. I don't know whether you can or
12 not. I mean, it's the same thing to me as
13 though he sat here and listened to Mr. Shell
14 testify and then came and testified himself on
15 the same subject.

16 Another way of looking at it is,
17 however, that would he be precluded from
18 reading this transcript of the deposition
19 before he came to testify today?

20 MR. SCHMIDT: I don't think he
21 would be, Your Honor.

22 MR. CARROLL: Your Honor, that is